SUPREME COURT OF THE UNITED STATES

No. 872

October Term, 1941

STATE OF GEORGIA, Appellant

vs.

HIRAM W. EVANS,
THE AMERICAN BITUMULS COMPANY
SHELL OIL COMPANY, INCORPORATED
EMULSIFIED ASPHALT REFINING COMPANY,
Appellees

Brief of the States of Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, as Amici Curiae.

WILLIAMS PTG. CO. ATLANTA

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AMICI CURIAE BRIEF

INTRODUCTION

The States of Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, sovereign States

of the United States of America, join in filing this brief as amici curiae in support of the contention of the State of Georgia that a State is not excluded from the remedy allowed "persons" under Section 7 of the Sherman Act and Section 4 of the Clayton Act. (See appendix).

REFERENCE TO REPORTS OF OPINIONS IN COURTS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is printed as State of Georgia vs. Evans, et al, in 123 Fed. 2nd, 57. (Advance sheet No. 1, December 8th, 1941).

STATEMENT OF JURISDICTION

The authors of this brief adopt the statement of jurisdiction as made in the brief for appellant.

INTEREST OF THE AMICI CURIAE

The named states believe the rule of law declared by the United States Circuit Court of Appeals for the Fifth Circuit in affirming the judgment of the United States District Court for the Northern District of Georgia in this case (see State of Georgia vs. Evans et al, 123 Fed. (2d) 57) to be erroneous because it improperly deprives a state of the right to maintain action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act (see appendix).

The states which have joined in filing this brief as amici curiae have no interest in the outcome of this cause insofar as the facts or merits of the particular case are concerned. In carrying on their governmental functions, however, they, like their sister state of Georgia, are compelled to purchase vast quantities of commodities in the open market. Accordingly they are vitally interested in seeing that their

rights to avail themselves of remedies for injuries or damages sustained while making such purchases (due to illegal, monopolistic practices against which the Federal Anti-Trust Laws are aimed) are not precluded by a construction of the acts in question which would divest them of such rights and remedies. Their sole interest is in the rule of law adopted by the Circuit Court of Appeals, and the apprehension of these amici curiae arises alone from their belief that if the doctrine announced in the Cooper case is applied (as was done by the Circuit Court) to a state, and the judgment of said court is not reversed, an erroneous principle of law will be allowed to stand, one which will greatly limit and restrict the remedies available to a State which has been injured or damaged in its property by a violation of the United States anti-trust laws.

STATEMENT OF THE CASE

The State of Georgia filed a civil action on March 25, 1941, alleging, in substance, that the respondents had violated Sections 1 and 2 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U. S. C. 1 and 2, and that by reason thereof the State was injured and damaged in its property in the actual amount of $128,027.13. The prayer was for treble damages. (R. 1-26).

The respondents filed separate motions to dismiss the complaint, asserting that the State was not a "person" upon whom a right of action for treble damages was conferred by Section 7 of the Act of July 2, 1890, or by Section 4 of the Act of October 15, 1914, Ch. 323, 38 Stat. 730, 731. (R. 27-34).

These motions were sustained and the District Court entered separate judgments dismissing the complaint as to

each of the Respondents. (R. 34). An appeal having been prosecuted, the Circuit Court of Appeals affirmed the judgment of the District Court. (R. 42).

THE ISSUES INVOLVED

The question presented is whether a state may maintain an action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act.

The pertinent provisions of these statutes are printed in the appendix herein.

ARGUMENT AND CITATION OF AUTHORITY

It was not the intention of Congress by the use of the word "person" in Section 7 of the Sherman Act and Section 4 of the Clayton Act to exclude a State from the remedies provided by those Sections. When a State as proprietor has suffered injury analogous to that suffered by a private individual it may avail itself of the remedies provided "persons" for the relief of such injury.

Ohio vs. Helvering, 292 U. S. 360, 369, 78 L. Ed. 1307, 1310;

Pennsylvania vs. Wheeling and Belmont, 13 How. 518, 559, 14 L. Ed. 249, 266;

Texas vs. White, 7 Wall 700, 19 L. Ed. 227;

Florida vs. Anderson, 1 Otto 667, 675, 27 L. Ed. 290, 297;

U. S. vs. San Jacinto Tin Co., 125 U. S. 273, 31 L. Ed. 747;

U. S. vs. American Bell Tel. Co., 128 U. S. 315, 32 L. Ed. 450.

If the rule were otherwise then the sovereign would be placed in a position worse than that of any of its subjects.

Pierce vs. U. S., 255 U. S. 398, 65 L. Ed. 697, 702.

A State is within the definition of "person" as used in the statute providing a remedy for the relief of an injury when the State has sustained the injury sought to be relieved by the statute. But even if a State is not strictly within the definition of a "person" as used in Section 7 of the Sherman Act and Section 4 of the Clayton Act, its right to avail itself of the benefit of those Sections is inherent by reason of its sovereignty, unless there is shown an intent, expressed or implied, on the part of Congress to exclude it from the remedies there provided. There is no such expressed or implied exclusion in those Acts.

The decision of this court in,

U. S. vs. Cooper Corporation, 312 U. S. 600, 61 S. Ct. 742, 85 L. Ed. 667,

is in conflict with a prior doctrine, intrinsically sounder and should be reviewed and overruled, insofar as said doctrine is sought to be applied to the right of a State to avail itself of the remedial provisions of the aforesaid statutes.

The rule of law adopted by the District and Circuit Courts, which prohibits the States from maintaining an action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act leaves the States without a remedy provided by those Acts, and therefore is believed to be inconsistent with the broad conception of public policy upon which the United States anti-trust laws were founded, to make the remedies co-extensive with the injury sought to be prohibited.

In addition to what is said herein the States filing this brief amici curiae adopt the argument and citations con-

tained in the brief filed by the appellant, and add their request that the judgment of the Circuit Court be reversed.

Respectfully submitted,

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APPENDIX

1890, July 2, Ch. 647, Sec. 7,
26 Stat. 209, 210.

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

1890, July 2, Ch. 647, Sec. 8,
26 Stat. 209, 210.

"That the word 'person,' or 'persons,' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

1914, October 15, Ch. 323, Sec. 4,
38 Stat. 730, 731.

"That any person who shall be injured in his business or property by reason of anything forbidden in the Antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

SUPREME COURT OF THE UNITED STATES.

No. 872.—October Term, 1941.

State of Georgia, Petitioner, *vs.* Hiram W. Evans; John W. Greer, Jr., American Bitumuls Company, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 27, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Complaining that the respondents had combined to fix prices and suppress competition in the sale of asphalt in violation of the Sherman Law, the State of Georgia, which each year purchases large quantities of asphalt for use in the construction of public roads, brought this suit to recover treble damages under §7 of that Act, 26 Stat. 209, 210; 15 U. S. C. § 15. According to that section, "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States . . . , and shall recover threefold the damages by him sustained . . . .' Section 8 provides that "the word 'person,' or 'persons,' whenever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 26 Stat. 209, 210; 15 U. S. C. § 7.

The District Court dismissed the suit on the ground that the State of Georgia is not a "person" under § 7 of the Act. Deeming the question controlled by *United States* v. *Cooper Corp.*, 312 U. S. 600, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment. 123 F. 2d 57. The importance of the question in the enforcement of the Sherman Law is attested by the fact that thirty-four states, as friends of the Court, supported Georgia's request that the decision be reviewed on certiorari. And so we brought the case here. 315 U. S. —.

The only question in the *Cooper* case was "whether, by the use of the phrase 'any person,' Congress intended to confer upon the United States the right to maintain an action for treble damages against a violator of the Act." 312 U. S. at 604. Emphasizing that the United States had chosen for itself three potent weapons for enforcing the Act, namely, criminal prosecution under §§ 1, 2, and 3, injunction under § 4, and seizure of property under § 6, the Court concluded that Congress did not also give the United States the remedy of a civil action for damages. This interpretation was drawn from the structure of the Act, its legislative history, the practice under it, and past judicial expressions. It was not held that the word "person", abstractly considered, could not include a governmental body. Whether the word "person" or "corporation" includes a State or the United States depends upon its legislative environment. *Ohio* v. *Helvering*, 292 U. S. 360, 370. The *Cooper* case recognized that "there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law." 312 U. S. at 604-05. Considering all these factors, the Court found that Congress did not give to the Government, in addition to the other remedies exclusively provided for it, the remedy of treble damages—the only remedy originally given to victims other than the Government of practices proscribed by the Act.

The considerations which led to this construction are entirely lacking here. The State of Georgia, unlike the United States, cannot prosecute violations of the Sherman Law.[1] Nor can it seize property transported in defiance of it. And an amendment was necessary to permit suit for an injunction by others than the United States. See *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 70-71, and Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737. If the State is not a "person" within § 8, the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act.

The question now before us, therefore, is whether no remedy whatever is open to a State when it is the immediate victim of a

[1] In 1914 Congress rejected an amendment to authorize the Attorney General of any State to institute a criminal proceeding, in the name of the United States, to enforce the anti-trust laws. 51 Cong. Rec. 14519, 14527.

violation of the Sherman Law. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. We have already held that such a remedy is afforded to a subdivision of the State, a municipality, which purchases pipes for use in constructing a waterworks system. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390. Reason balks against implying denial of such a remedy to a State which purchases materials for use in building public highways. Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word "person", in § 7 as to exclude a State. Such a construction would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State.[2]

Reversed.

Mr. Justice BLACK concurs in the result.

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[2] We put to one side the suggestion that if the Sherman Law gives a State a right of action, Article III of the Constitution would give this Court original jurisdiction of such a suit if a State saw fit to pursue its remedy here. If the district courts are given jurisdiction, a State may bring suit there even though under Article III suit might be brought here. United States v. California, 297 U. S. 175, 187.

Mr. Justice ROBERTS.

I agree that this case is not ruled by our decision in *United States* v. *Cooper Corp.*, 312 U. S. 600. Certain of the reasons adduced in support of that decision are inapplicable here. I am, nevertheless, of opinion that the judgment should be affirmed. I base this conclusion upon the plain words of the Sherman Act. Section 7 provides that "any person who shall be injured in his business or property by any other person", by any action forbidden by the statute, may sue and recover damages therefor. Section 8 provides that the word "person" or "persons", wherever used in the Act, "shall be deemed to include corporations and

associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

If the word "person" is to include a state as plaintiff, it must equally include a state as a defendant or the language used is meaningless. Moreover, when in §8 Congress took the trouble to include as "persons" corporations organized under the laws of a state, the inference is plain that the state itself was not to be deemed a corporation organized under its own laws any more than the United States is to be deemed a corporation organized under its own laws.

It is not our function to speculate as to what Congress probably intended by the words it used or to enforce the supposed policy of the Act by adding a provision which Congress might have incorporated but omitted.